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No. 82-258

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

In Re: Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, MDL Docket No. 150 WPG
All State Cases

The States of Arizona, California, Florida, Oregon and Washington,

Petitioner,

vs.

McGraw-Hill, Inc.,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED FOR REVIEW

The Question Presented for Review is the same as that expressed in Petitioners' Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

The Statement of the Case is the same as that expressed in Petitioners' Petition for Writ of Certiorari.

REASONS FOR GRANTING CERTIORARI

The Reasons for Granting Certiorari are the same as those expressed in Petitioners' Petition for Writ of Certiorari. In addition In Re Roche, 448 U.S. 1312 (1980) cited by Respondent at p. 11 of its Brief in Opposition provides another basis for granting certiorari. In granting a Stay in Roche, supra of a state court's execution of a civil contempt order against a newsman for refusing to disclose the identities of his news sources, Justice Brennan was required

to determine inter ilia whether or not there was a "reasonable probability" that four Justices would find the issue sufficiently substantial to grant certiorari. Id. at 1314.

Determining that it was probable that certiorari would be granted in that case, Justice Brennan said:

> "Branzburg v. Hayes, 408 U.S. 665 (1972), held that the First Amendment does not provide newsmen with an absolute qualified testimonial privilege to be free of relevant questioning about sources by a grand jury.
> . . . At the same time, there is support for the proposition that the First Amendment interposes a threshold barrier to the subpoenaing of confidential information and work product from a news gatherer."

Id. at 1314 - 1315.

If the question of whether or not a newsman has a First Amendment privilege to harbor his sources on a state disciplinary proceeding would have been sufficiently important to be reviewed by the court two years ago, that same question involving an apocryphal newsman in a civil proceeding continues to be equally important today.

Respondent's assertion in point II of its Brief in Opposition that Petitioners have raised, for the first time in this case, the argument that this Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972) precludes the application of a three-part balancing test is disingenuous. Petitioners have consistently argued for the application of Branzburg to this case

rather than Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), cert. denied 411 U.S. 966 1973) (See, J.A. 40 - 41 and 229 11. 3 - 7; BRIEF FOR PLAINTIFFS-APPELLEES 11 - 12).

Moreover, Respondent in points I and IV[1] for its Brief in Opposition misunderstands the thrust of Petitioners' argument. It would be an error in protocol for Petitioners to ask the Court

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[1]Respondent's only other argument in point III of its Brief in Opposition is grounded on an incorrect premise. The Court looks to Court of Appeals, not trial court decisions to determine whether certiorari should be granted (Rule 17.1(a), Rules of the Supreme Court).

to review the correctness of the Court of Appeal's Application of the Baker, supra three part test; nor are Petitioners advocating that the antitrust laws are superior to the First Amendment.

Rather, Petitioners ask the Court to review the propriety of the Court of Appeal's creation of a constitutional privilege in this case in the face of Branzburg, supra. Petitioners also argue that if the Court chooses to recognize a privilege, that it be one that can be overcome vel non by the application of the more reasonable balancing test of Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); and not the impassible three part test expressed

in Baker, supra. Petitioners do argue that within the Farr, supra framework the need for application of the antitrust laws outweighs the need for Platt's to keep its sources secret.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing were sent by U.S. mail postage fully prepaid on September 29, 1982 to the following:

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